IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2012 OF 2003

IN

SUIT NO. 2046 OF 2003

Tarun Sankwalkar & anr. .. Plaintiffs.

vs.

J. Paul de Sousa & Ors. .. Defendants.

Mr. D.D. Madon a/w Denzil D'mello

for the plaintiffs.

Mr. Aspi Chinoy i/by Anil D'Souza

for defendants 1 to 3.

CORAM : S.U.KAMDAR, J.

DATE : 18th January,2006.

P.C.

. The present suit is filed in respect of the flat being flat no. 3 on the first floor in the building known as Shirin bearing Municipal Street No. 31, Colaba Road, Mumbai 400 005. It is the case of the plaintiffs that the defendant nos. 1 to 3 and/or defendant nos. 4 to 6 be directed to restore their possession in respect of the suit flat premises and the defendants should be further restrained from remaining upon entering upon or

using or occupying the suit flat. It is the case of the plaintiffs that they are unlawfully evicted on 17.3.2003 without following due process of law. Pending the hearing and final disposal of the suit interim orders are sought for the appointment of receiver and injunction.

2. It is not in dispute that some time on or about 1.9.1969 the deceased A.X.M. Mendes was put in possession by Prof. Mendonca in respect of the aforesaid flat and that in 1978 he filed RAD Suit No. 5227 of 1978 seeking declaration that he is tenant of the suit premises by virtue of amendment in Rent Act on 12/73. In the said RAD Suit a written statement was filed by the defendant in which it is inter alia stated as under :-

> "In the circumstances hereinbelow stated stated, the plaintiff has been a rank trespasser in the suit premises ever since the month of June 1970."

It is the case of the plaintiffs that the said averment made in the written statement establishes that the plaintiffs were already in possession since the month of June, 1970. Even before me it is not disputed that the original deceased A.X.M. Mendes was in use, occupation and possession of the suit flat since 1970. However, it is the contention of

the defendant that he was put in possession as a paying guest and after being put in possession he has filed wrongfully the said RAD suit in the Small Causes Court at Bombay and in fact neither deceased nor the plaintiffs have any right, title and interest in the suit premises. It is the further case of the defendant that sometime in or about 1996 Mr. A.X.M. Mendes returned the possession of the suit flat by surrendering the same to the defendant and relocated himself in Goa and he also handed over the keys of the said flat to the defendant. It is the further case of the defendant that though the said A.X.M. Mendes vacated the premises, he did not remove few items which were lying in the suit flat and took some time to remove the said items. It is also the case of the plaintiff that in 1980, the eldest son of the said deceased had already moved to Goa where their family properties and home are situated. He also got married and was thereafter residing at Goa since then. It is the further case of the defendant that in 1985 the younger son of the deceased also went abroad for seeking employment and got married and never returned to the suit premises. In 1990/91, Mrs. Belmira Mendes who was ailing also moved to Goa to their elder son and ultimately expired in 1993. It is the case of the defendant that in the aforesaid circumstances in 1994-95 the said A.X.M. Mendes also moved out of the premises and ultimately surrendered the said flat in 1996 to

the defendant herein. The said Mendes thereafter expired sometime in or about August, 2002.

3. It is the case of the defendant that the possession of the suit flat was with the defendant since 1996 and in 1999 the said flat was visited by a Government approved Valuer who carried out survey when none of the plaintiffs were found in possession but in fact the defendant was in use, occupation and possession of the said flat. It is also the case of the defendant that only after the death of the said Mendes that the plaintiffs herein started visiting the suit flat by using surreptitiously the duplicate key of the said premises and thereafter there was correspondence by and between the society and the plaintiffs asking the plaintiffs to stop user of the said premises. It is the case of the defendant that the said correspondence came in possession of the plaintiffs because the same was addressed to the suit premises and that the plaintiffs were using the said duplicate key for having access to the suit premises and thus are using said correspondence as if the same was given to them. It is the further case of the defendant that in the aforesaid circumstances the society called the police and he was informed in March 2003 that some unauthorised person is visiting the suit premises and that after notice to the Cuffe Parade Police Station the defendants put its own lock on the said flat

premises by replacing the lock which was already there and was used by the plaintiff for access to the suit flat premises. The learned counsel for the plaintiffs has contended that in the aforesaid circumstances it is ex facie clear that there is a valid surrender in favour of the defendants in 1996. It has been further contended that by virtue of the aforesaid circumstances which exists, it may be inferred that there is a valid surrender otherwise the plaintiffs would have made their claim in respect of the flat but there is no claim made by the plaintiffs at any point of time. He has also drawn my attention to the fact that there was no correspondence between 1996 and 2000 and 2002 indicating that the plaintiffs were not in use, occupation or possession of the suit premises. It has also been brought to my notice that said flat had a telephone bearing no. 215 2686 which was surrendered in 1996 only but the plaintiffs unlawfully got new telephone installed in 2002. It is, therefore, contended that the present notice of motion should be dismissed as there is a valid surrender in favour of the defendants of the suit flat.

4. On the basis of the aforesaid circumstantial evidence, the learned counsel for the defendants contends that there is a valid surrender of the premises in their favour and thus, the plaintiffs

are not entitled to the grant of any interim relief.

5. From the material on record and the evidence which is produced before me I am of the opinion that the possession of Mr. Mendes is established beyond doubt by virtue of the admission of the defendants themselves in para 5 of the written statement which has been tendered by the defendants in the RAD suit proceedings being RAD Suit No. 5227 of 1978 in Small Causes Court at Bombay. Thus, at all points of time the said Mendes was in possession and the said fact has been established by the aforesaid averments which are reproduced from the written statement. The only question, therefore, which is required to be decided is whether there is a surrender by Mendes of the premises as claimed by the defendants in 1996. In so far as surrender is concerned, it is an admitted position that there is no document of any nature whatsoever produced to indicate that there has been a surrender of the premises and/or a tenancy by the deceased Mendes but circumstantial evidence is sought to be placed in service in support of the contention that there has been a surrender of the possession of the premises. Even after considering the circumstantial evidence, in my opinion, prima facie the surrender is not established of the said premises. In so far as the dispossession is concerned it is not disputed that on 17.3.2003 the defendants have changed the lock of

the said flat premises and thus prevented the entry of the plaintiffs in the suit premises. In fact it is the case of the defendants that till 17.3.2003 the plaintiffs were having access to the suit premises though according to them it is unauthorizedly and surreptitiously and by using the duplicate key. In my opinion, once the surrender is not established in 1996 then obviously the dispossession has taken place on 17.3.2003 when the lock on the suit flat has been changed by the defendants herein.

6. Now, turning to the contention of the learned counsel for the defendants that various circumstances establish surrender of possession of the premises, firstly I am of the opinion that at the prima facie stage without evidence is led in detail, it is not possible to accept a circumstantial surrender by virtue of accepting the evidence which is sought to be produced. Otherwise also the prima facie evidence which has been relied upon to establish the circumstantial surrender does not inspire any confidence in the court, and therefore, I am not willing to accept the said contention that merely by a surrender of the telephone connection or merely because certain letters are addressed by the society or due to the fact that during the life time of Mendes other relatives had left the premises and gone abroad in

any manner indicate any surrender of the premises in 1996. In my opinion, prima facie it is clear that there has been dispossession of the plaintiffs from the suit premises on 17.3.2003. Now, turning to the reliefs in normal circumstances the defendants who have taken law in their own hands by dispossessing the plaintiffs from the premises must be dispossessed and receiver should be directed to take physical possession of he suit flat. It is because a person can not be permitted to have a fruit of its illegal and unlawful action. However, keeping in mind that the defendants are the owners of the suit premises and the plaintiffs are not in continuous use, occupation of the said premises the interest of justice would be met by passing the following order:-

> That the Court Receiver, High Court, Bombay is appointed as a receiver. The Court Receiver however will not dispossess the defendants from the suit premises but appoint the defendants as his agents. The Court Receiver will not insist on security but the defendants will be liable to pay royalty charges in accordance with the market value of the lat. In any event, if the defendants are not inclined to accept the agency of the Court Receiver then the

Court Receiver will take physical possession of the suit premises and invite bids of any other person to be appointed as an agent of the Court Receiver in respect of the suit premises. Till the time the Court Receiver takes possession, there shall be an injunction order in terms of ad-interim order already passed. Motion disposed of accordingly. No order as to costs.

. The learned counsel appearing for the defendants seeks stay of the order for a period of four weeks. Stay granted for a period of four weeks.